

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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APR - 8 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the matters of )

Application of )

CAPITOL RADIOTELEPHONE, INC.  
d/b/a CAPITOL PAGING )

PR Docket No. 93-231

For a Private Carrier Paging  
Facility on 152.480 MHz in  
Huntington/Charleston, WV )

Imposition of Forfeiture re )

CAPITOL RADIOTELEPHONE, INC.  
d/b/a CAPITOL PAGING )

Former Licensee of Station  
WNSX646 in the PLMRS )

Revocation of Licenses of )

CAPITOL RADIO TELEPHONE, INC.  
d/b/a CAPITOL PAGING )

Licensee of Stations WNDA400  
and WNWW636 in the PLMRS )

Revocation of Licenses of )

CAPITOL RADIOTELEPHONE COMPA-  
NY, INC. d/b/a CAPITOL PAGING )

Licensee of Stations KWU373,  
KUS223, KQD614 and KWU204 in  
the PMRS )

To: Administrative Law Judge Joseph Chachkin

CAPITOL RADIOTELEPHONE COMPANY, INC.  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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April 8, 1994

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To: Administrative Law Judge Joseph Chachkin

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

CAPITOL RADIOTELEPHONE COMPANY, INC. (a/k/a Capitol Radiotelephone, Inc. or Capitol Radio Telephone, Inc.) d/b/a CAPITOL PAGING ("Capitol"), by its attorneys and pursuant to §1.263 of the Commission's rules, respectfully submits its proposed findings and conclusions to the Presiding Judge in

the captioned proceeding. As demonstrated more fully below, the Hearing Designation Order<sup>1</sup> in this case was erroneously and improvidently entered. The evidence adduced at the hearing demonstrates that Capitol's application for and operation of its Private Carrier Paging (PCP) station was in all respects a bona fide business venture; Capitol has not violated the Commission's rules governing PCP operation; and Capitol has at all times dealt honestly and forthrightly with the Commission. Accordingly, this proceeding should be terminated forthwith. In support thereof, Capitol respectfully shows:

#### PRELIMINARY STATEMENT AND SUMMARY

Two diametrically opposite portrayals of Capitol have emerged in this proceeding. The Capitol portrayed in the HDO is a devious enterprise which launched its private carrier paging system as part of a sinister plot to disrupt the operations of its competitor RAM Technologies, Inc. (RAM), and whose every action in connection with that system was taken in furtherance of that sinister plot.

However, as demonstrated by the evidence adduced at the hearing, that portrayal is an outrageous libel promoted by RAM for the illicit purpose of driving Capitol from its licensed PCP channel. Unfortunately for Capitol, the Private

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<sup>1</sup> Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, FCC 93-381, adopted August 3, 1993 and released August 31, 1993, 8 FCC Rcd 6300 (FCC 1993), hereinafter sometimes cited as the "Hearing Designation Order" or "HDO".

Radio Bureau caused that libel to be published in the HDO without adequate inquiry or analysis -- perhaps as a result of unwarranted Congressional intervention.

In fact, as demonstrated by the evidence adduced at the hearing, Capitol, like many other traditional common carriers, decided to enter the private carrier paging business simply as an adjunct to its existing paging services and to diversify its offerings to the public. The frequency on which it elected to do so, 152.48 MHz, was an obvious choice for both business and technical reasons. However, that frequency was already being used by RAM, and RAM was determined not to share it with Capitol, notwithstanding that it was required by law to do so.

Accordingly, RAM initiated an unrelenting attack on Capitol from the time Capitol first submitted its application for frequency coordination. RAM first claimed that Capitol should not get its PCP license because the frequency 152.48 MHz was too busy to admit Capitol's system. When that argument did not dissuade the National Association of Business and Educational Radio (NABER) from coordinating that frequency, RAM escalated its tactics and claimed that Capitol should not get its license because Capitol intended to use the PCP system to interfere with RAM's operations.

When that argument did not dissuade the Private Radio Bureau, RAM again escalated its tactics by recruiting a Member of Congress to lobby the Commission on RAM's behalf,

and by initiating the filing of unfounded complaints of interference against Capitol. Despite the fact that Capitol forcefully denied RAM's allegations whenever Capitol was made aware of them, the Bureau eventually caved in to RAM's complaints and ordered an inspection of Capitol for the purpose of finding violations on which the Bureau could revoke all of Capitol's radio station licenses, both PCP and common carrier.

In the meantime, as a result of technical problems with its system and RAM's deliberate interference to Capitol's transmissions, Capitol was never able in actual practice to get beyond the technical shakedown phase for its PCP system. Erroneously and unjustifiably, the Bureau evidently interpreted this lack of commercial success as "proof" of Capitol's malevolent intent, and initiated punitive sanctions against Capitol.

The Bureau first issued a Notice of Apparent Liability for Forfeiture (NALF) against Capitol in the amount of \$20,000 alleging "malicious[] interfere[nce]" and "egregious misconduct" by Capitol during the course of a field inspection by the Field Operations Bureau. In fact, however, Capitol was conducting its PCP operations "by the book and, for the most part, correctly". When Capitol challenged the basis for the NALF, the Bureau responded with the extreme and unusually harsh measure of initiating a license revocation proceeding against Capitol, alleging not only malicious

interference by Capitol but also misrepresentation and lack of candor as well.

Not only does the evidence adduced at the hearing wholly exonerate Capitol from all charges of misconduct, it also shows that in fact it is RAM and not Capitol that engaged in "egregious misconduct". Moreover, the Bureau failed to adduce even a shred of evidence to support its charges against Capitol of lack of candor and misrepresentation. Under these circumstances, Capitol should be cleared of all charges of misconduct levelled by the HDO; Capitol's good name and reputation should be promptly restored; and this proceeding should be terminated forthwith.

#### PROPOSED FINDINGS OF FACT

1. Capitol is a radio common carrier providing common carrier paging and mobile radio services under various licenses issued under Part 22 of FCC rules. (CAP-01 at p. 1).<sup>2</sup> These licenses authorize the provision of mobile radio service predominately in the area around Charleston, West Virginia, as well as radio paging services throughout much of the state of West Virginia and into a portion of Ohio. (Id.). Capitol has been an FCC licensee for 30

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<sup>2</sup> Citations herein to exhibits shall be in the form "CAP-\_\_" for Capitol exhibits and "PRB-\_\_" for Private Radio Bureau exhibits, followed by a reference to the page number for the specific citation. Citations to the hearing transcript shall be in the name of the witness testifying, followed by the page number (e.g., Raymond Tr. \_\_).



years, and it is also certificated and regulated by the West Virginia Public Service Commission. (Id.).

2. By far the biggest component of Capitol's business is its common carrier paging business, with approximately 2,900 customers and 10,000 units in service. (CAP-01 at p. 2; Raymond Tr. 831). Capitol also has provided telephone answering service in Charleston since the early 1950s; and it also provides a variety of ancillary services such as facsimile transmissions and mail drops. (CAP-01 at p. 2; Raymond Tr. 1401).

3. Capitol's entry into the PCP business initially was the idea of J. Michael Raymond, Capitol's Vice President - Chief Operating Officer. (CAP-01 at pp. 1-2). Capitol's motive in doing so was to supplement its existing paging services with a lower-cost paging service. (CAP-01 at p. 2).

4. Establishing a separate PCP for this purpose was preferable to the alternatives for a variety of regulatory, technical and cost reasons. (CAP-01 at pp. 2-5). The frequency 152.48 MHz was chosen because it was the only VHF PCP frequency on which high-powered paging transmitters were allowed and it offered the possibility of networking. (Id.). Capitol's analysis and strategy decisions in this regard were typical of many other RCCs in the industry. (CAP-23 at pp. 5-8; Peters Tr. 1214).

5. RAM is a PCP licensee on 152.48 MHz at various locations in Kentucky, Ohio and West Virginia under the call sign WNJN621, including Charleston, West Virginia and the Ashland, Kentucky/Huntington, West Virginia area. (CAP-18 at p. 3; CAP-20 at pp. 2, 12-15). RAM started its PCP business in early 1989. (Moyer Tr. 87).

6. After Capitol sent in its application to NABER for frequency coordination in December 1989, RAM promptly protested the application, arguing that 152.48 MHz was too busy from RAM's use of the channel to permit Capitol to be licensed. (CAP-01 at p. 6; CAP-18 at pp. 3-8, 11-18).<sup>3</sup> Nonetheless, NABER coordinated Capitol's application for 152.48 MHz on March 22, 1990, and forwarded the application to the Commission for processing and grant. (CAP-01 at p. 7; CAP-18 at p. 1).

7. Immediately thereafter, RAM started filing a steady stream of protests at the FCC attempting to prevent Capitol's application from being granted. (CAP-01 at p. 7; CAP-02; CAP-03; CAP-04; CAP-05). These protests included what purported to be a Petition to Deny pursuant to Section

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<sup>3</sup> As part of its campaign against Capitol at NABER, RAM evidently also orchestrated communications in support of RAM's position by ostensibly independent licensees. Exhibit CAP-18, p. 13, is a copy of a letter to NABER about Capitol's application, purportedly sent by the President of T&T Communications. Examination of the document, however, shows that it was faxed to NABER by Joyce & Jacobs (RAM's counsel), unsigned and not on letterhead, the day before the letter was dated. The inference is compelling, therefore, that this ostensibly independent expression of concern was in fact written by RAM itself on its own behalf.

309(d) of the Communications Act (CAP-02), and a companion Motion for Stay of Application (CAP-03), notwithstanding that Section 309(d) petitions are not even permitted to be filed against PCP applications. (CAP-06 at p. 1).<sup>4</sup>

8. In these protests RAM escalated its campaign against Capitol by claiming that Capitol was applying for its proposed PCP license for the purpose of "caus[ing] harmful co-channel interference" to RAM's operations. (E.g., CAP-02 at pp. 3-5). Unknown to the Commission, this type of allegation by RAM was not unique to Capitol; RAM made similar allegations to NABER about the intentions of another competitor in another incident about this same time, after the competitor complained to NABER that RAM's operations on 152.48 MHz were violating Commission rules. (CAP-18 at pp. 21-23).

9. On August 9, 1990, the Bureau initially rejected RAM's various protests against Capitol as erroneous, unfounded and unsupported. (CAP-06). However, RAM was undeterred and promptly filed a petition to overturn the Bureau's decision, along with another motion seeking to stay

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<sup>4</sup> Given the extremely tenuous basis for the allegations in RAM's petition to deny and motion for stay, RAM's pleadings would have to be characterized as excessively aggressive even in application proceedings where Section 309(d) petitions to deny are permitted. In application proceedings such as for PCP licenses, where petitions to deny are not permitted, they properly should be characterized as improper harassment and an abuse of the Commission's processes.

the proceedings on Capitol's application. (CAP-07; CAP-08; CAP-09).

10. After the Bureau rejected RAM's protest, RAM again escalated its attack on Capitol by recruiting Carl C. Perkins, a Member of Congress from Kentucky, to lobby the Commission on RAM's behalf. (CAP-18 at p. 20). Subsequently, Congressman Perkins repeatedly intervened with the Commission on RAM's behalf. (CAP-10; CAP-01 at p. 9).

11. One of the actions Perkins requested the Commission to take was to require Capitol to move its proposed PCP operation to the frequency 157.74 MHz, which had recently been made available for high-powered PCP transmitters. (CAP-10). However, making that frequency switch was undesirable for Capitol because it understood that Union Carbide, one of Capitol's largest common carrier paging customers, was using 157.74 MHz for an emergency service in the Charleston area. (CAP-01 at pp. 9-10).

12. Capitol understandably did not want to risk alienating Union Carbide by initiating a PCP service on that frequency. (Id.). Also, moving to 157.74 MHz was undesirable for Capitol because it would limit Capitol's eventual ability to network with other PCP systems. (CAP-01 at p. 10).

13. Notwithstanding Congressman Perkins' intervention on RAM's behalf, Capitol was granted its initial PCP license for base station facilities on 152.48 MHz at Charleston, West Virginia and Huntington, West Virginia, Call Sign

WNSX646, on September 12, 1990. (CAP-15 at p. 1). Thereafter, RAM again escalated its attack on Capitol by filing a written complaint with the Commission in November 1990, alleging that Capitol was retransmitting pages from 152.51 MHz (Capitol's wide area RCC paging frequency) on the frequency 152.48 MHz, and that such transmissions were causing harmful interference to RAM's operations. (CAP-01 at p. 10; CAP-11 at p. 2). According to RAM, the alleged retransmissions caused an almost perfect "stereo effect" when RAM personnel simultaneously monitored the frequencies 152.51 MHz and 152.48 MHz. (Moyer Tr. 75; Capehart Tr. 284; Bobbitt Tr. 466-68).

14. The way Capitol found out about this alleged interference problem was that RAM served a copy of its written complaint on counsel for Capitol. (CAP-01 at p. 10). However, RAM mailed the complaint to the wrong address which delayed its receipt by Capitol's counsel by several days. (CAP-01 at p. 10; CAP-11 at p. 1). Immediately upon receipt of RAM's complaint, Capitol prepared and submitted a declaration by Mr. Raymond under penalty of perjury, categorically denying RAM's allegations. (CAP-11 at pp. 2-3).

15. In fact, Capitol had not even started operating its PCP system by that time and it did not cause the alleged "retransmissions". (CAP-01 at p. 22; Raymond Tr. 813-4, 1013, 1303-4). The "stereo effect" phenomenon which ostensibly caused RAM to complain to the Commission probably was

an instance of intermodulation, of which Capitol had no knowledge and would not have discovered upon inspection after RAM's complaint. (Peters Tr. 1095-99).<sup>5</sup>

16. RAM next filed a complaint of interference at the Commission against Capitol on March 5, 1991, claiming that Capitol's station identification on 152.48 MHz was interfering with RAM's paging transmissions. (CAP-01 at pp. 10-11; CAP-12 at p. 3). This time Witness Capehart, currently RAM's Corporate Vice President (Capehart Tr. 277), had called Witness Raymond on March 4, 1991, to complain about Capitol's station ID transmissions prior to filing the written complaint at the Commission. (CAP-12 at p. 3).

17. At that time Capitol was in the process of installing and testing its PCP system, and was getting ready to initiate commercial service. (CAP-01 at p. 11). Its system consisted of a base station transmitter at Capitol's

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<sup>5</sup> Witness Walker disagreed with Witness Peters' opinion to a certain extent, evidently because in Walker's experience intermodulation has been accompanied with audio degradation that would be discernible at least to a trained technician. (Walker Tr. 1483-4). Witness Peters testified that in his experience there have been instances of intermodulation where the audio is "almost perfectly pure". (Peters Tr. 1204-5). Both witnesses may have been saying essentially the same thing a different way, or Witness Peters' experience in this regard may be somewhat broader than Witness Walker's. In any event, the bias of RAM's witnesses and their eagerness to pin an interference complaint on Capitol would readily explain their failure to note any distortion of the audio during the "stereo" effect. Moreover, Witness Walker agreed that there evidently were problems with intermodulation on 152.48 MHz at other times (Walker Tr. 1484), which supports Witness Peters' opinion that this incident likely was caused by intermodulation as well.

Nease Drive site in Charleston, and at Capitol's site in Huntington. (Id.). Capitol's paging terminal was connected to the PCP base station at Nease Drive by dedicated telephone line, and a UHF control link located at Nease Drive was used to simulcast the Charleston and Huntington transmitters. (Id.).

18. A Relm transceiver was modified to function as a fixed tuned receiver monitoring 152.48 MHz and "inhibiting" Capitol's PCP transmitter from operating whenever a co-channel signal was detected by the receiver. (CAP-01 at p. 11; CAP-21). This "inhibitor" was in place and functioning in Capitol's PCP system throughout Capitol's operation, both in the initial constructing and testing stages and after commercial operation started. (CAP-01 at p. 11; Raymond Tr. 1341; CAP-21). Accordingly, Raymond believed that the purpose of Capehart's call on March 4, 1991 was to try to "set Capitol up" rather than solve a legitimate interference problem. (CAP-01 at p. 12).

19. Nonetheless, Raymond attempted to be cooperative with Capehart to resolve the alleged problem, and the upshot of their telephone conversation on March 4th was that Raymond agreed to try to get a technician out to investigate the problem that day. (CAP-12 at pp. 3-4). Raymond was unable to do so, but the alleged interference stopped later that same day anyway. (CAP-12 at p. 4; Capehart Tr. 281). That tended to confirm in Raymond's mind that Capehart's

call was not a bona fide complaint about interference by Capitol. (CAP-12 at p. 4).

20. Moreover, during this same period of time, Capehart admitted in telephone conversations with Raymond that RAM had completely disabled its own "inhibitor" on 152.48 MHz, so that it could blot out any "interference" from other transmitters. (CAP-01 at p. 12; CAP-12 at p. 5; Raymond Tr. 1014, 1302-03, 1345-46). As a result, when Capitol attempted to start its commercial PCP service on March 12, 1991, RAM repeatedly initiated paging transmissions on its system while a paging transmission by Capitol was in progress. (CAP-12 at pp. 5-6). That is, RAM would "walk" on Capitol's PCP pages. (Id.).

21. Another issue of concern to Capitol at the time was that RAM would transmit on 152.48 MHz for long periods of time, sometimes up to 15 or 20 minutes in a row, before relinquishing the channel to co-channel users. (CAP-01 at pp. 14-15; CAP-12 at p. 5). Capitol had been advised by NABER that FCC rules required PCP licensees to shut down their system after three minutes to allow other licensees to use the channel, and it was obvious to Capitol that RAM was not doing so. (CAP-01 at pp. 14-15). Capitol considered this another form of interference to its operations by RAM, because it prevented Capitol from transmitting its pages. (CAP-01 at pp. 14-15; CAP-12 at p. 5).



22. On April 2, 1991, the Private Radio Bureau held a meeting at its offices in Washington, D.C. with counsel for Capitol, counsel for RAM, principals of RAM and a representative from the office of Congressman Perkins. (HDO at ¶4 & n. 8). At that meeting the staff bluntly told RAM and Capitol to cut out their fighting and obey the rules, or all of their licenses would be revoked by the FCC. (CAP-01 at p. 14). Capitol did not interpret this threat as being directed solely against it, because Capitol did not believe it was doing anything wrong and it was sincerely trying to comply with the rules governing PCP operations. (Id.).

23. An outgrowth of this meeting, however, was a letter from the Chief, Land Mobile and Microwave Division, to Capitol advising that RAM was not bound by the "three-minute" rule because its system was not "interconnected" within the meaning of the rules. (CAP-14 at p. 2). This letter was sent to Capitol notwithstanding that the Commission's own data base reflected at the time that RAM was fully authorized for interconnected (FB6C) operations. (CAP-20 at pp. 2, 13-15).

24. During this period time, Raymond also called Witness Walker at the Commission's Field Operations Bureau in Baltimore from time to time to complain about RAM transmitting on top of Capitol's pages and holding the channel for long periods of time. (CAP-01 at p. 15). Witness Capehart also was making similar calls on RAM's behalf

complaining about interference by Capitol. (Walker Tr. 109, 150-151).

25. In late March, during this sequence of complaints, RAM's employees came to the conclusion that the reason Capitol would transmit over RAM's pages was there was some sort of technical "problem in the receiver of [Capitol's] busy monitor". (CAP-20 at pp. 5, 7). RAM's conclusion in this regard evidently was never contemporaneously communicated to Capitol.<sup>6</sup>

26. Instances of interference are common in the radio business, but rarely are deliberate; and Walker did not believe the allegations of deliberate interference by either Capitol or RAM. (Walker Tr. 151-152). Walker generally refused to get involved in the dispute between RAM and Capitol. (CAP-01 at p. 15).

27. In light of the staff's admonitions at the April 2 meeting and the lack of response by the Commission to Capitol's concerns, Capitol eventually stopped registering its complaints, notwithstanding that RAM did not alter its conduct. (CAP-01 at pp. 14-15).

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<sup>6</sup> The letter from Capehart to Walker does not show that a copy was sent to Capitol (CAP-20 at p. 6); and Witness Capehart could not recall whether he sent a copy to Capitol. (Capehart Tr. 229-30). Witness Raymond recalls "some conversations" with RAM personnel around March 1991 concerning interference complaints, without any indication that RAM had apprised Capitol of RAM's conclusions in this regard. (CAP-01 at p. 12). The inference is compelling, therefore, that RAM in fact communicated its conclusions regarding Capitol's busy monitor only to the Commission and not to anyone at Capitol.

28. In addition to the interference by RAM's transmissions, Capitol also experienced continuing technical difficulty with its system which affected the reliability of its service from the beginning of its operation in March 1991 until at least July 1992. (CAP-01 at pp. 16-18; CAP-15 at pp. 2-6). This technical difficulty related to interfering transmissions on Capitol's UHF "link" frequency from sources other than RAM, and to the reliability of the transmission path for the radio link frequency between the Charleston base station and the Huntington base station. (Id.).

29. Because of these technical difficulties, RAM's interfering transmissions, and its continuous use of the channel for long periods of time without relinquishing it for co-channel users, Capitol experienced considerable turnover of customers that tried the PCP service and found it unsatisfactory. (CAP-01 at pp. 16-18; Raymond Tr. 1416-21; Harrison Tr. 711-12, 742-44). Indeed, for these same reasons Capitol had only a small handful of customers on its PCP system in August 1991. (Raymond Tr. 1380, 1417-18).

30. On July 19, 1991, RAM again complained orally to the Commission that Capitol was maliciously interfering with RAM's PCP system, claiming that Capitol had a "device that is patched in to its paging base station that imitates the sound of a tone page transmission". (CAP-19). RAM further claimed that this "device used by Capitol is paging station testing equipment" which "is capable of being removed in

less than one minute". (Id.). However, Capitol was not served with a copy of any such complaint, nor was it made aware of any such complaint by RAM at the time. (CAP-01 at p. 18).

31. In fact, Capitol never had and never used such a device. (Raymond Tr. 810). Nonetheless, this complaint evidently was the "straw" that broke the camel's back, because the Private Radio Bureau immediately requested the Field Operations Bureau to conduct an inspection of Capitol for the purpose of finding grounds to revoke Capitol's licenses. (CAP-19; Walker Tr. 1477).

32. In response to the Private Radio Bureau's request, Witnesses Walker and Bogert made a field trip to the Charleston/Huntington area to conduct monitoring of 152.48 MHz and inspections of Capitol's and RAM's PCP stations during the period August 12-15, 1991. (Walker Tr. 114, 1477-79). On Monday, August 12, 1991 the inspectors monitored 152.48 MHz and kept logs a "good portion of the day;" on Tuesday morning, August 13 logs were also kept, but not in the afternoon; on Wednesday, August 14, they monitored while driving to Ashland to inspect RAM's station; and on Thursday, August 15, they monitored in the morning before arriving in Charleston to inspect Capitol's PCP station. (Walker Tr. 133; PRB-03 at pp. 1-2).

33. When they monitored 152.48 MHz they heard predominantly digital transmissions which they identified as trans-

missions by RAM, and fewer tone paging transmissions which they identified as transmissions by Capitol. (Walker Tr. 112). A third transmitter on 152.48 MHz was also monitored, which the inspectors identified as WNLM930. (PRB-03 at p. 2).

34. When the inspectors monitored 152.48 MHz, the tone transmissions identified as Capitol transmissions appeared to be identical sequences of tones -- a set of two sequential tones repeated once, followed by a second and third set of sequential tones. (PRB-03 at p. 2). The inspectors also observed morse code station identifications by Capitol at the rate of approximately seven words per minute. (PRB-03 at p. 2). This speed translates into about 15 seconds of air time per identification. (Walker Tr. 183).

35. According to the inspectors, the tone sequences identified as Capitol transmissions were transmitted approximately once a minute when the channel was available, but, when it was busy, the tones were held until air time was available on the channel. (PRB-03 at p. 2; Walker Tr. 112-3, 136, 145; Bogert Tr. 254). These transmissions were legitimate test transmissions by Capitol. (CAP-22; Harrison Tr. 732-35; Raymond Tr. 1311-22, 1418-21).

36. During their monitoring the inspectors observed instances of RAM initiating transmissions before Capitol ceased transmitting (i.e., instances of RAM "walking" on Capitol's transmissions), as well as instances of Capitol

"walking" on RAM's transmissions. (PRB-03 at p. 1). The inspectors observed that RAM "walked" on Capitol's transmissions more than vice versa (Walker Tr. 157); in fact, their logs show that such instances were caused 90 percent of the time by RAM and only 10 percent of the time by Capitol. (CAP-23 at p. 11).

37. The reason for RAM "walking" on Capitol's transmissions was discovered during inspection of RAM's PCP station; RAM had installed a device on its frequency monitor to delay RAM's paging transmissions for only a maximum of two minutes whether or not anyone else was using the channel. (PRB-03 at p. 2; Bogert Tr. 259).<sup>7</sup> The decision to install such a device was made by Mr. Moyer, the owner of RAM, and he knew when he installed it that doing so was unlawful. (Capehart Tr. 357-58).<sup>8</sup>

38. By contrast, the inspectors never were able to determine why Capitol occasionally "walked" on RAM's transmissions. (Walker Tr. 167, 173; Bogert Tr. 259). The explanation probably is that transient factors such as local traffic, signal fades and the like, prevented Capitol's monitor from detecting RAM's signal in particular situa-

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<sup>7</sup> This device will sometimes hereinafter be referred to as a "two-minute time-out" device.

<sup>8</sup> This admission by Witness Capehart is extremely telling. Witness Moyer sat in the hearing room throughout the hearing; he obviously heard Witness Capehart's testimony in this regard; and he was readily available to testify in rebuttal to Witness Capehart on this point but did not.

tions. (CAP-23 at p. 11; Bogert Tr. 259-60). Witness Walker does not believe that Capitol knowingly transmitted while RAM was already on the air. (Walker Tr. 172).

39. The inspectors inspected Capitol's facilities on Thursday, August 15, 1991. (PRB-03 at p. 3). During the inspection Witness Bogert had a telephone discussion about the switch settings on the terminal card, relating to the speed of the morse code identification, directly with a representative of the manufacturer of the card. (CAP-01 at p. 19; Bogert Tr. 257, 271-72).

40. At the end of this conversation Witness Bogert made a statement to Raymond to the effect that the switch settings must be the right ones. (CAP-01 at p. 19; Bogert Tr. 273; Walker Tr. 1451-52). Raymond believed on the basis of this exchange that the inspectors had been satisfied, and did not pursue the matter further at the time. (CAP-01 at p. 19).<sup>9</sup>

41. At no time during the inspection did the inspectors communicate to Capitol that they had observed Capitol interfering with RAM. (CAP-01 at p. 20). When they left at

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<sup>9</sup> The inspectors dispute that Raymond should have been left with that impression, despite Witness Bogert's statement about the factory settings. It is not necessary to resolve this conflict in the testimony, however, because the inspectors corroborate Witness Raymond's testimony that the reason for the slow speed was Capitol's good faith reliance on the correctness of the factory settings for the dip switches (CAP-01 at p. 24), and not some plot to interfere with RAM by deliberately slowing down the identification transmissions, as alleged in the HDO.

the end of the inspection, Capitol assumed that it had passed the inspection and that it did not need to take any further action. (Id.).

42. On May 19, 1992, the Private Radio Bureau sent a Section 308(b) inquiry to Capitol as a result of the field inspection in August 1991. (PRB-10). In that inquiry the Bureau alleged in general terms that Capitol's PCP station "was causing harmful interference, did not appear to be serving any paging customers, and, if conducting tests, was doing so in violation of procedures specified in the Commission's rules". (Id. at p. 1). Accordingly, the Bureau advised that the staff was "currently determining what compliance action, if any, to take with respect to Capitol's FCC licenses as a result of these apparent violations" and requested Capitol to provide enumerated items of information related to those allegations. (Id.).

43. Capitol responded in full to the Bureau's inquiry on June 17, 1992. (PRB-11). Nonetheless, the Bureau issued a Notice of Apparent Liability for Forfeiture (NALF) on July 30, 1992, alleging "willful and repeated ... malicious[] interfere[nce]" by Capitol to RAM and other "egregious misconduct". (PRB-12 at pp. 1-2).

44. The Bureau alleged that forfeitures totalling \$42,000 were warranted for malicious interference in violation of Section 333 of the Communications Act; forfeitures totalling \$6,000 were warranted for failure to take reason-



able steps to avoid harmful interference, in violation of Section 90.403(e) of the Commission's rules; and forfeitures were warranted totalling \$3,000 each for violation of Sections 90.405(a)(3) and 90.425(b)(2) of the rules (excessive testing and morse code identification slower than the prescribed rate of 20-25 words per minute, respectively). (PRB-12 at p. 3). The Bureau then reduced the calculated total forfeiture from \$54,000 to \$20,000 so that the NALF could be issued under delegated authority. (Id.).

45. Simultaneously with the NALF issued to Capitol, the Bureau issued a warning letter to RAM that use of the two-minute time-out device on its system was improper. (CAP-25). However, no forfeiture of any kind was sought by the Bureau. (Id.).

46. Capitol submitted its Rebuttal Statement to the NALF on September 30, 1992, refuting all material allegations of misconduct in the NALF. (PRB-13).

47. After the NALF was issued by the Bureau, RAM personnel started monitoring the PCP channel 152.48 MHz and Capitol's wide area RCC channel 152.51 MHz with a pair of Hark Verifiers. (Blatt Tr. 373-76). The Hark Verifier is an electronic device with a radio receiver that can be tuned to a particular paging frequency, and a decoder that deciphers information contained in a paging signal. (Blatt Tr. 373-74). When connected to a printer, the decoded output